Circuit Court of the United States, for Third Circuit, November, 1852.

SUTTON *et. al. v.* THE ALBATROSS.

1. The receipt of a new note, without a fresh consideration, is not satisfaction of an account or a waiver of a lien, unless accepted as such; and of this a receipt "in full" is only *prima facie* evidence, open to explanation. *Jones* v. *Shawhan*, 4 W. & S. 263, approved.

2. A material man having a lien *in rem* against a domestic vessel, took from the owner, before all the work was completed, notes for the whole of his account against him, including repairs furnished to other vessels, and signed a receipt "in full" therefor. From the circumstances it appeared that the object of the former was not to obtain negotiable security, but to prevent a dispute about his account, and that the receipt had been given as a form, without the attention of the parties being at all drawn to it. *Held* that there was no waiver of the lien.

Appeal from the District Court of the United States, sitting in Admiralty.

This was a libel by Sutton & Co., Steam Engine and Boiler Makers, of Philadelphia, against the Steamship Albatross, a domestic vessel, for machinery and repairs furnished to her between the 15th of November, 1851, and the 1st of Janunry, 1852, under a contract with her owners, the Philadelphia and Atlantic Steam Navigation Company; the amount claimed being about $1600.

The answer of Ambrose W. Thompson, for himself and others, assignees for creditors of the Steam Navigation Company, after setting forth the assignment, admitted that the work and materials were furnished as stated in the libel, but alleged by way of defence, that on the 16th of December, 1851, James T. Sutton, one of the Libellants, called on Thompson, then President of the Company, and requested as a personal favor, that he should be permitted to render his bill for work and materials up to that time, so that it might be examined and settled for by note, before Thompson resigned from the Presidency of the Company, as he then contemplated doing; Sutton urging as a reason for his request that, although all the work was not completed, they (the Libellants) were

in want of paper, and if Thompson should resign, they might be delayed in obtaining a settlement.

The answer then stated, that persuaded by these reasons, and for the purpose of accommodating Sutton, the Respondent consented, and that Libellants accordingly furnished their bill, which embraced every item mentioned in the account annexed to the Libel, upon which four notes of different dates at four months each, were executed for its amount, in the name of the Company; and that the Libellants then gave a receipt in these words:

"Received, Philadelphia, Dec. 16, 1851, from the Philadelphia and Atlantic Steam Navigation Company, their four notes of Nov. 17th and 26th, and Dec. 6th and 16th, amounting to thirty-six hundred and forty-five dollars and eighteen cents, at four months, in full, for repairs of Steamships to this date.

$3,645 18. JAMES T. SUTTON & CO."

The answer submitted thereupon, that these notes and receipt were a waiver by the Libellants of their lien against the vessel, and that consequently that lien was forfeited and abandoned.

No formal replication appears to have been filed.

The only evidence in the case was the deposition of Samuel T. Pierce, who had been Superintendent of the Company, and in charge of their books. The material parts of his testimony are as follows:

"Mr. Thompson was President of the Company in December, 1850. I was present at an interview between Mr. Thompson and Mr. Sutton, in relation to the work on the 16th December. Mr. Sutton rendered his bill for work against both the Albatross and Osprey, up to that date, and requested that Mr. Thompson would close it by notes, previous to his resignation, and the rest of the Board; as, if that was not done, a new Board might raise some dispute or difficulty, which he wished to avoid. Mr. Thompson examined the account, and requested me to draw four notes for the amount, in equal portions, and to take Mr. Sutton's receipt for them. That is all I recollect that passed. I drew the notes and took the receipts. The notes were given at the request of Mr. Sutton, on account of the Directors being about to resign. Mr. Sut-

ton's mode of dealing, account and settlement, with the Company, six months settlements; first of January and July—for *repairs*. I say for repairs, because contracts for building are different; they are settled when they are finished.

"Mr. Sutton requested this settlement as a favor, on account of the expected resignation. He requested it prior to the usual time of settlement, for the reasons I have mentioned.

"They actually resigned, subsequently, but their resignations were refused by the Stockholders."

On cross examination, the witness stated that Mr. Sutton's account was a running account; that by the words "their course of settlement" he meant what he learnt from the books, as well as his own knowledge, admitting that he had never been present at any interview between Sutton and others, on behalf of the Company, as to how he was to be paid for his work, except on the day when the notes were given; and that no notes were given under these six months settlement, except those on the contracts.

It is to be remarked, that the notes received by Sutton were never negotiated, but were brought into Court at the hearing, and surrendered; and that the receipt was a mere printed form, filled up by the Clerk.

The lien claimed by the Libellants, was given by the Acts of Assembly of Pennsylvania, of 1836 and 1837, with regard to the attachment of vessels. (Purdon's Dig. 90, 92.)

The District Court, on the hearing of the case decreed for the Libellants, for the full amount of their demand, with interest and costs; from which decree the Respondents appealed, when the case was argued by

St. Geo. T. Campbell, for Libellants.

G. M. Wharton and *Balch*, for Respondents.

GRIER J.—That the libellants had a lien on the steamboat Albatross for their bill of repairs, by the statute laws of Pennsylvania, is not disputed. The only question is, whether they have relinquished that security by taking the notes of the owners. In solving this question, there is also no difficulty as to legal questions affecting the case. Taking the note of hand of the debtor, is not, *per se*, legal

satisfaction, unless there is evidence that the parties intended it should operate as such. Where the debtor has two securities, as in the present case, it will not be easily presumed that he has voluntarily relinquished one of them, and that the best of the two,

The giving the receipt for the notes, as in full of the account, it is true, is *prima facie* evidence, that such was the case. But a receipt is no estoppel; and when we consider how little attention is usually paid to the peculiar form or expressions of such documents, signed by mechanics, and drawn up by the clerk of the employer, such formal words may be easily rebutted, by showing the true nature of the transaction. The note taken is no higher security than the account, and unless the transaction shows an intention to surrender without consideration, the better security, these formal words in a receipt given, when the account is settled, ought not to be considered as at all conclusive of an intention to receive the lesser security as satisfaction. The case of *Jones vs. Shawhan*, 4 Watts & Serg. 263, is directly in point, and states the law as applicable to this case. The law as laid down in that case is this—a new note without a fresh consideration, is not satisfaction of an account, or of a preceding note, *unless it has been accepted as such;* and though the presumption is, that a larger security is not exchanged for a smaller one, yet a receipt taken for the lesser security, as "*in full*," is but evidence to go to the jury to subvert such presumption. But it is not conclusive, and when opposed by the presumption, it may be explained by showing that there was no contract to take the lesser security and release the better, and that the intention to accept it as satisfaction, and relinquishment of another security, was not in the contemplation of the parties. In this Court, the duty of finding these facts, cannot be devolved on a jury; and on careful examination of the evidence, I am convinced that the libellant when he signed the receipt, had not the idea before his mind, of realising any security held by him; nor did the officer with whom this settlement was made, contract for any such release, or that the notes should be received in actual satisfaction.

In the first place, it does not appear that notes were demanded for the purpose of having a merchantable security on which to raise

money, or that they were used for that purpose. They are brought into Court and surrendered. Secondly, the libellants called for a settlement of their accounts, not for the purpose of getting immediate payment, by note, but to have the account settled and adjusted before Mr. Thompson and the officers who had dealt with libellant, should send in their threatened resignations. The notes were given as evidence of the amounts of the balance due on settlement, says the witness "on account of the Directors being about to resign." When the account was stated and adjusted with the President of the Company, he ordered the clerk to draw these notes and take a receipt of them. No direction was given to the clerk in what form to draw the receipts, either by Thompson or Sutton. The clerk drew it in the usual form. Sutton signed it without noticing its form, or perhaps reading it. His object was to get his account *settled*, so that he might not have difficulty with the officers of the corporation. No suggestion was made by either party, that these notes were either wanted to raise money on, or given as favors, or received as a satisfaction of and other security held by the mechanic.

There was no consideration given, or intended to be given for the relinquishment of one of the mechanics' secureties, nor did such an act enter into the contemplation of either of the parties at the time of the settlement. The clerk drew the receipt in the usual form in his receipt book, without any instruction from either party to put it in any particutar form, and thus made it have an apparent effect which was not within the scope of the contract, or contemplation of the parties.

Upon a more careful examination of the case, I feel satisfied that a jury would have been justified in finding that it was not the intention of the parties to this settlement, to give or receive these notes in satisfaction of the debt, so as to relinquish the security on the vessel, given by law to the libellants.

The judgment of the District Court is therefore affirmed.[1]

[1] The authorities on the question of the effect of a negotiable security taken for an antecedent debt, which are numerous and conflicting, are collected and ably discussed in the notes to Cumber *v.* Wain, 1 Smith, L. Cases, [146]; and to Swift *v.* Tyson, 1 Am. Lead. Ca. 191.